

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLARENCE WAITE	:	DETERMINATION
	:	DTA NO. 818401
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law	:	
for the Period March 29, 2000.	:	

Petitioner, Clarence Waite, 91 McLean Avenue, Yonkers, New York 10705-2415, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period March 29, 2000.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on December 17, 2001 at 10:30 A.M., with all briefs to be submitted by February 28, 2002, which date commenced the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel).

ISSUE

Whether petitioner is liable for the penalty imposed by the Division of Taxation for failure to be registered as a dealer of cigarettes and tobacco products for the year 2000.

FINDINGS OF FACT

1. Petitioner, Clarence Waite, is the owner of the Faith Grocery Store (“Faith Grocery”), a small grocery store located at 91 McLean Avenue, Yonkers, New York. Faith Grocery sells beer, candy, cigarettes and grocery items.

2. On March 29, 2000, an investigator from the Alcohol, Cigarette and Tobacco Products Bureau of the Division of Taxation (“Division”) conducted a retail inspection of Faith Grocery. The investigator concluded that petitioner was selling cigarettes without a valid New York State Certificate of Registration. This conclusion is stated on the Tax Enforcement Referral Report filed by the investigator. An accompanying Cigarettes, Alcohol and Tobacco Regulatory Report indicates that on the date of the inspection, there were two cartons of cigarettes “on hand” at Faith Grocery. This latter report also identifies 565 Retail Inc. as petitioner’s supplier of cigarettes and tobacco products, and indicates petitioner’s purchase of three cartons of cigarettes under an invoice dated February 9, 2000, as well as the purchase of one box of cigars under an invoice dated February 19, 2000. The report lists the tax stamp numbers for the cigarettes.

3. On August 11, 2000, the Division issued to petitioner a Notice of Determination assessing a penalty in the amount of \$2,500.00 pursuant to Tax Law § 480-a(3)(a). This notice included the following statement in explanation:

During an inspection of your premises, on 03/29/00, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarette and/or tobacco products.

Therefore, a civil fine is imposed under Article 20 of the New York State Tax Law.

4. On May 1, 2000, approximately one month after the above-described inspection, petitioner mailed a completed Form DTF-716 (“Application for Registration of Retail Dealers and Vending Machines for Sales of Cigarettes or Tobacco Products”) seeking to renew his

license as a cigarette and tobacco products retail seller for the year 2000. It is undisputed that petitioner possessed a valid license for the year 1999. It is also undisputed that petitioner did not renew such license upon its expiration on December 31, 1999, allegedly because he lacked the funds to do so.

5. Petitioner was previously issued a Notice of Determination on February 3, 1998 under which a fine in the amount of \$1,000.00 was assessed for the same violation as is stated in this matter, to wit, selling cigarettes without a valid Certificate of Registration. Petitioner does not dispute the lack of a valid license for 1998, but alleges that he simply forgot to renew such license upon its expiration at the end of 1997. It appears that the assessment for the 1998 violation was paid.

6. The annual registration fee for a New York State Certificate of Registration is \$100.00.

CONCLUSIONS OF LAW

A. Tax Law § 480-a(1)(a) provides that every retail dealer of cigarettes and tobacco products is required to register with the Division and publicly display a certificate of registration in each place of business in New York State. Tax Law § 480-a(3)(a) provides that any retail dealer who violates the foregoing provision shall, for a first violation, be liable for a civil fine not to exceed \$1,000.00. A second or subsequent violation within three years following a prior finding of a violation results in liability for a civil fine not to exceed \$2,500.00.

B. Petitioner had a valid certificate of registration as a retail seller for the year 1999. However, he admittedly did not have a valid certificate of registration for the year 2000 at the time of the inspection on March 29, 2000. Notwithstanding this latter fact, petitioner disputes the violation at issue, asserting that he did not actually sell any cigarettes to the investigating agent, and maintaining that the investigator did not actually witness anyone purchasing any

cigarettes from petitioner. Petitioner goes on to note that there were no receipts in his store showing that he had sold any cigarettes to anyone after the expiration of his license.

Accordingly, petitioner maintains that he cannot be held to be in violation of Tax Law Article 20.

C. Petitioner's arguments are rejected. First, the investigator's report reveals that there were two cartons of cigarettes on hand at the premises on March 29, 2000. This is consistent with petitioner's admission in testimony that there were approximately 10 to 15 packs of cigarettes displayed in the plexiglass rack at the store. Such circumstances clearly support the conclusion that petitioner had, and was offering, cigarettes for sale. More to the point, however, is the information in the report that petitioner purchased three cartons of cigarettes from his supplier on February 9, 2000. This directly negates petitioner's testimony that he had purchased no cigarettes after the expiration of his license. Furthermore, the fact that petitioner purchased three cartons of cigarettes on February 9, 2000, but had on hand only two cartons of cigarettes on March 29, 2000, clearly belies petitioner's claim that although he had cigarettes on hand (essentially inventory), he was not offering the same for sale and had sold no cigarettes subsequent to the expiration of his license.

D. Under the facts of this case, petitioner was clearly in violation of Tax Law § 480-a on March 29, 2000, and thus was subject to the assessment of a civil fine as provided thereunder. It is also clear that this violation was a second violation under such section and that it occurred within three years after the 1998 violation for which an assessment was issued on February 3, 1998. Consequently, the \$2,500.00 amount of the fine was proper pursuant to Tax Law § 480-a(3)(a) (*see, Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001).

E. The petition of Clarence Waite is hereby denied and the notice of determination dated August 11, 2000 is sustained.

DATED: Troy, New York
July 11, 2002

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE